Supreme Court, U.S.
FILED
JUN 21 1995
OFFICE OF THE CLERK

(2)

No. 94-1901

In the

Supreme Court of the United States

October Term, 1994

LA SOCIÉTÉ GÉNÉRALE IMMOBILIÉRE
AND LSGI, INC.,

Petitioners,

v.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY AND THE CITY OF MINNEAPOLIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court should uphold a general verdict when it determines that none of the possible bases for the verdict supports the verdict as a matter of law.

2. Whether a court should remand a case for a new trial when it determines that none of the possible bases for the verdict supports the verdict as a matter of law.

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v.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY AND THE CITY OF MINNEAPOLIS,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION

Respondents the Minneapolis Community Development Agency and the City of Minneapolis respectfully request that this Court deny LSGI's Petition for a Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 44 F.3d 629.

STATEMENT OF THE CASE

The facts relevant to the Court's consideration of LSGI's Petition for a Writ of Certiorari are set forth in the Eighth Circuit's opinion and are reprinted in the Appendix to the Petition at pages 2a to 9a.

ARGUMENT

This case revolved around the issue of how customized commercial contract language negotiated between a sophisticated commercial real estate developer and a multifaceted municipal government affected a dispute over how a 3 1/2 block shopping and office complex should be designed around Nicollet Mall, the street which serves as the north-south axis and retail spine of Minneapolis. When the developer was unable to accomplish even key preliminary steps to the construction of the project after 3 1/2 years, the contract was canceled, with each party blaming the other. The Eighth Circuit, reviewing a jury verdict in favor of the developer, found the verdict to be unsupported by the law or the evidence and held that the City of Minneapolis was entitled to judgment as a matter of law. The court's resolution of this case turned on uncontroversial state law contract principles applied to unique facts. Nothing about this litigation raises issues of significant legal precedent, much less national concern.

LSGI wants this Court to determine whether LSGI presented the jury with a breach of contract theory that was supported by evidence that the Eighth Circuit failed to consider. Recognizing that such a parochial issue is likely to be of little interest to the Court, LSGI attempts to disguise what it wants by claiming that this case provides a "perfect vehicle" for determining whether Griffin v. United States, 502 U.S. 46 (1991), should apply to civil cases. Pet. 11. It is

doubtful whether a case that does not discuss the question for which certiorari is sought – and that requires the Court to review the entire record below to determine whether the question even arises – is the perfect vehicle for considering the question. Even if it were, however, and the Court were inclined to step into the shoes of the Eighth Circuit and determine what evidence was presented to the jury and whether the evidence was sufficient to sustain the verdict, the Court would never reach the question of whether Griffin should apply to civil cases. First, the Eighth Circuit was right when it held that none of the evidence presented to the jury was sufficient to sustain a verdict for breach of contract. Second, and perhaps more important, Griffin simply does not apply to cases, like this one, in which the jury has been given legally erroneous instructions. Finally, the question raised by the Petition was decided long ago.

The second question proposed by LSGI likewise raises nothing for this Court to consider. It is undisputed that a civil case must be remanded when a court of appeals cannot determine whether a general verdict rests on proper or improper grounds. The Eighth Circuit always follows this rule when it is applicable. This rule was not applicable here, however, because the Eighth Circuit properly determined that the jury's verdict necessarily rested on improper grounds. Because neither of the questions presented in LSGI's Petition are raised by this case, LSGI's Petition for a Writ of Certiorari should be denied.

I. THIS CASE DOES NOT IMPLICATE GRIFFIN.

Griffin involved a defendant charged with one count of criminal conspiracy involving two separate objects: (1) conspiring to impair the efforts of the IRS and (2) conspiring to impair the efforts of the DEA. When the jury returned a

general verdict of guilty, the defendant argued that the verdict could not stand because:

> it left in doubt whether the jury had convicted her of conspiring to defraud the IRS, for which there was sufficient proof, or conspiring to defraud the DEA, for which (as the Government concedes) there was not.

Griffin, 502 U.S. at 48 (citation omitted). The Supreme Court upheld the conviction stating that "a general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds." Id. at 49. In so holding, the Court stated that it was not making new law, but was merely applying a common law rule that could be traced as far back as 1775. Id. at 48-50 (referring to Peake v. Oldham, 1 Cowper 275, 276, 98 Eng. Rep. 1083 (K.B. 1775)). The Court also noted that this rule was limited to cases involving only insufficiencies of proof and that verdicts in cases involving errors of law could not be upheld and that such cases instead had to be remanded for new trials. Id. at 58-60.

A. Griffin Is Inapplicable Because The Verdict Is Not Supportable On Any Of The Grounds Submitted To The Jury.

LSGI argues that the Court should grant certiorari to determine whether the rule set forth in Griffin applies to general verdicts in civil cases. Pet. (i). By its terms, however, the rule only applies when "a general jury verdict . . . [is] legally supportable on one of the submitted grounds." Griffin, 502 U.S. at 49. The Eighth Circuit expressly found that none of the grounds submitted to the jury supported the verdict. Pet. App. 22a. Thus, this Court cannot reach the question LSGI suggests is suitable for certiorari unless it reviews the

entire record below and determines that the Eighth Circuit erred when it held that none of the grounds submitted to the jury supported the verdict. A less apt situation for determining whether the rule set forth in Griffin should be extended to civil cases hardly can be imagined.[1]

Moreover, a review of the record below will show that Griffin is not implicated by this case because the Eighth Circuit was right when it concluded that the verdict was unsupported by any of the grounds submitted to the jury. Although LSGI now claims that "the case was submitted to the jury on the theory that the City's overall course of conduct, including its violations of its obligation of good faith and fair dealing, constituted a breach of contract," and that the court "totally ignored . . . substantial evidence" of the City's "other bad faith breaches in the months following November 1987 . . . which separately supported the jury's general verdict of breach," Pet. 7, 10 (emphasis in the original),[2] this simply is not true.

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[1] By way of contrast, the City notes that in Griffin the question of whether a general verdict in a criminal case should be upheld when some of the grounds submitted to the jury were unsupported by the evidence was squarely before the Court. There was no dispute that one of the two grounds submitted to the jury supported the verdict and that the other did not, and the court of appeals in Griffin expressly addressed the question of whether to uphold the verdict or remand for a new trial before the case was considered by the Supreme Court. Griffin, 502 U.S. at 47-48.

[2] The "other bad faith breaches" to which LSGI refers apparently include: (1) the issuance of a notice of default; (2) a thirty-day extension to secure two anchor tenants; (3) the City's suggestion that the Project be reduced in size; and (4) an alleged subsidy given to Bell Canada Development. Pet. 5-7.

LSGI also makes a vague reference to breaches of Projects 2 and 3. Pet. 10. At trial, LSGI argued that its negotiations in 1988 and 1989 regarding a smaller project resulted in a contract that the City breached. The trial court granted the City's motion for a directed verdict on this issue, however, and LSGI did not appeal this issue to the Eighth Circuit. Thus, this issue is not properly before this Court. See, e.g., Delta Air Lines, Inc. v. August, 450 U.S.

The Eighth Circuit, which had all of the evidence before it, including the evidence relating to the events LSGI now claims were part of a single breach of contract theory, "analyze[d] the evidence in the light most favorable to" LSGI and found that LSGI had submitted three independent theories of breach of contract to the jury – the Cramer Resolution, breach of an implied covenant of good faith, and unavoidable delay. Id. 9a-11a, 14a-18a.[3] The court considered each theory in turn and found each to be insufficient as a matter of law. Id. 9a-21a.[4] In so finding, the court did not ignore

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346, 362 (1981); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). To the extent LSGI's reference to Projects 2 and 3 is intended to refer to something else, the City has no understanding of what LSGI means.

[3] LSGI admitted that it argued three independent theories of breach of contract to the jury – and not one as it now claims – while opposing the City's post-trial motions:

> LSGI alleged and argued at least three independent theories of breach of contract. First, it alleged, argued and proved that the MCDA breached . . . the Development Contract by adopting the November 3, 1987 "Cramer Resolution" . . . . Second, LSGI alleged, argued and proved that Defendants, through their entire course of conduct, and in particular M[illegible]or Fraser's letters to Nordstroms and Neiman Marcus, breache[illegible] implied covenant of good faith and fair dealing. Third, LSGI alleged, argued and proved that Defendants breached the Contract by terminating it during a period of "unavoidable delay" as defined by the Contract.

Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict or New Trial or Remittitur, at 6 (included in the appendix the City filed with the Eighth Circuit at A-712).

[4] As regards the Cramer Resolution, the court held that the Development Agreement was unambiguous and expressly gave the City Council the right to reject LSGI's dome and tunnel concept. Pet. App. at 9a-14a. The court then held that the exercise of a contractual right cannot be a breach of contract, as a matter of law. Id. at 14a. The court also held that the right was not lost by the mere passage of time and that the City Council could

evidence of post-November 1987 events as LSGI claims, but carefully examined all of the factual underpinnings of LSGI's case, expressly mentioning at least three of the four events upon which LSGI now seeks to rely – the notice of default, the thirty-day extension, and the City's suggestion that the size of the Project be reduced. Pet. App. 7a-8a.[5]

Thus, LSGI's claim that the Eighth Circuit "totally ignored . . . substantial evidence" of other breaches is nothing more than a disagreement with the Eighth Circuit's choice of what facts to emphasize in its opinion. A court is not obligated, however, to mention every piece of evidence when writing an opinion. See, e.g., McIntosh v. Weinberger, 810 F.2d 1411, 1429-30 (8th Cir. 1987) ("The Court is not required to render specific findings with respect to every item of evidence presented to it."), vacated on other grounds sub nom. Turner v. McIntosh, 487 U.S. 1212 (1988); Straight v. Wainwright, 772 F.2d 674, 678-79 (11th Cir. 1985) (mere fact that opinion did not discuss all of the evidence does not indicate that court did not consider all of the evidence), cert. denied, 475 U.S. 1099 (1986) and 476 U.S. 1130 (1986); Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 515-16 (5th Cir. 1969) ("Courts need not indulge in exegetics, or parse or

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exercise the right while sitting as the MCDA Board. Id. at 15a. As regards the implied covenant of good faith and fair dealing, the court focused on the events primarily relied upon by LSGI – the Mayor's statements – and held that they were not unjustifiable as a matter of law and thus did not constitute a breach of contract. Id. at 15a-18a. The court also held that the Mayor's statements were not a breach of contract because there was no evidence that the Mayor's statements had hindered LSGI's performance. Id. at 16a-18a. As regards unavoidable delay, the court held that the provision requiring notification of unavoidable delays within thirty days of their commencement was enforceable and that LSGI's nonperformance was not excused because it had failed to comply with this provision. Id. at 18a-21a.

[5] The Eighth Circuit noted the suggestion regarding the size of the project when it referred to the MCDA's letter dated May 11, 1988 and the subsequent negotiations that lasted until May 1989. Pet. App. 8a.

declaim every fact and each nuance and hypothesis.").[6] Further, because the Eighth Circuit focused on the facts LSGI itself relied upon and emphasized – the Cramer Resolution, the Mayor's statements, and unavoidable delay – the Eighth Circuit can hardly be faulted for its choices. See supra at 6 n.3.[7] To the extent LSGI continues to claim that it relied upon other events at trial, however, the Eighth Circuit must be presumed to have found that they did not support the jury's verdict. See, e.g., In re Texas Mortgage Servs. Corp., 761 F.2d 1068, 1075 n.12 (5th Cir. 1985) ("If a trial judge fails to make a specific finding on a particular fact, the reviewing court may assume that the court impliedly made a finding consistent with his general holding so long as the implied finding is supported by the evidence."); Swanson & Youngdale, Inc. v. Seagrave Corp., 561 F.2d 171, 173-74 & n.5 (8th Cir. 1977); Clinkenbeard v. Central Southwest Oil Corp., 526 F.2d 649, 651-52 (5th Cir. 1976); Burkhard v.

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[6] One commentator has noted:

> No one would contend that every consideration that influences a judge toward agreement with a result announced ought invariably to be included in the opinion. Some motivations are negligible, some never become explicit, and some may better be left unmentioned. The urge to do justice in the particular case does not demand detailed explanation, when doing justice does not disrupt existing principle and theory.

Leflar, Some Observations Concerning Judicial Opinions, 61 Colum. L. Rev. 810, 818 (1961).

[7] This is particularly true because the first time LSGI identified specific events other than the Cramer Resolution, the Mayor's statements, and unavoidable delay as possible breaches of contract was in its post-hearing memorandum. Pet. App. 51a. LSGI's attempt to file such a memorandum and the court's subsequent rejection of it merely emphasizes that LSGI did not rely upon events other than the Cramer Resolution, the Mayor's statements, or unavoidable delay at trial.

Burkhard, 175 F.2d 593, 596 (10th Cir. 1948).[8] Thus, there are no theories or events that the Eighth Circuit failed to address that are capable of supporting the jury's verdict, and the question of whether the rule set forth in Griffin should be applied to civil cases simply does not arise.

B. Griffin Is Inapplicable Because The Jury Was Given Legally Erroneous Instructions.

Even if the Supreme Court were interested in reviewing the record to determine whether the Eighth Circuit somehow misconstrued LSGI's theory of breach of contract or overlooked a fact upon which LSGI relied, and were to determine that the jury's verdict was supported by the evidence, the Court would not reach the question LSGI claims is appropriate for certiorari because the rule set forth in Griffin does not apply here. As previously noted, the rule is limited to cases involving legally sound but factually insufficient theories. Consequently, Griffin does not apply when the jury has been presented with a legally unsound theory and been given a legally erroneous jury instruction. See supra at 4.[9] Because

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[8] This presumption is supported by the fact that, as a matter of law, none of the additional events identified by LSGI constitute a breach of contract. Three of the events – the issuance of a notice of default, a thirty-day extension to secure two anchor tenants, and the City's suggestion that the size of the project be reduced – involved the exercise of contractual rights, which the Eighth Circuit expressly held (while discussing the Cramer Resolution) could not be a breach of contract, as a matter of law. Pet. App. 14. The fourth – the alleged subsidy to Bell Canada – presumably would have been part of LSGI's tortious interference claims, which the jury rejected, finding the City's actions not to be wrongful. Verdict, questions 7-8 (included in the appendix the City filed with the Eighth Circuit at A-710).

[9] LSGI admits as much when it describes Griffin as holding that "[s]o long as one of the bases for a general verdict has sufficient evidentiary support and the jury has not been given a legally erroneous instructions, the general verdict must be affirmed." Pet. 12 (emphasis added).

the jury in this case was allowed to consider legally unsound theories and was given legally erroneous jury instructions, this case does not implicate Griffin.

The trial court's most glaring error was its determination that the Development Agreement was ambiguous. This error resulted in the court instructing the jury that interpretation of the Development Agreement was to be left to the jury as a question of fact, which in turn allowed the jury to consider whether the Cramer Resolution or the Mayor's statements breached the Development Agreement. The Eighth Circuit, however, correctly held that the Development Agreement was unambiguous and that its interpretation was a question of law for the court. Pet. App. 9a-14a. The Eighth Circuit also held that, when the Development Agreement was interpreted correctly, neither the Cramer Resolution nor the Mayor's statements constituted a breach of contract, as a matter of law. Id. at 9a-18a.

Another major error was the trial court's instruction to the jury that the jury should decide, as a question of fact, whether LSGI had "reasonably complied" with the provisions in the Development Agreement regarding unavoidable delay. This error allowed the jury to consider whether LSGI's obligations had been excused by an unavoidable delay. The Eighth Circuit, however, held as a matter of law that LSGI's obligations were not excused because LSGI had failed to provide the notice required by the Development Agreement. Id. at 18a-21a.

It is indisputable, therefore, that the trial court made errors of law that resulted in the jury being given erroneous instructions and allowed the jury to consider legally erroneous theories. Because the rule set forth in Griffin does not apply to cases involving legally insufficient theories and erroneous jury instructions, the rule cannot apply here. Thus, granting

certiorari in this case to determine whether the rule set forth in Griffin should apply in civil cases would be pointless.[10]

II. THE EIGHTH CIRCUIT'S DECISION TO REVERSE DOES NOT CONFLICT WITH THE GENERAL RULE IN CIVIL CASES THAT VERDICTS THAT MAY BE BASED ON IMPROPER GROUNDS SHOULD BE REMANDED FOR A NEW TRIAL.

As an alternative ground for granting certiorari, LSGI argues that the Eighth Circuit's decision "conflicts with the decisions of several courts of appeals holding that general verdicts possibly based on improper grounds, whether legal or factual, at a minimum should be remanded for retrial." Pet. 14-15. No one disputes, however, that remand is required in a civil case when it is impossible to determine whether a jury's

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[10] The City notes that LSGI's Petition also should be denied because the question it raises has already been decided and is a matter of settled law. In Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907), the Supreme Court held that a civil case involving a general verdict must be remanded when an appellate court is unable to determine whether the verdict rested on sufficient or insufficient grounds. Id. at 78-79. In so doing, the Court expressly noted that the common law rule applicable to criminal cases – the rule the Court applied in Griffin – did not apply to civil cases.

> And of course, in a case like the one we are considering, we cannot maintain the verdict, as might be done in a criminal case, upon a general verdict of guilty upon all the counts of an indictment.

Id. (citation omitted). Fulton has been consistently followed by the federal courts of appeal for almost ninety years. See, e.g., Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark, 39 F.3d 812, 818-21 (7th Cir. 1994), cert. denied, 1995 WL 156498 (U.S. May 15, 1995); Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660, 667 (6th Cir. 1993), cert. dismissed, 114 S.Ct. 2700 (1994); Ely v. Blevins, 706 F.2d 479, 480-81 (4th Cir. 1983); Murphy v. United States, 653 F.2d 637, 646 (D.C. Cir. 1981).

verdict rests on proper or improper grounds. This is the rule set out by the Supreme Court in Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907). See supra at 11 n.10. It also is a rule the Eighth Circuit has followed time and again. See, e.g., Todd Farm Corp. v. Navistar Int'l Corp., 835 F.2d 1253, 1257 (8th Cir. 1987); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1236-37 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); Dudley v. Dittmer, 795 F.2d 669, 673 (8th Cir. 1986) ("The rule in this circuit is clear that when one of two theories has erroneously been submitted to the jury, a general verdict cannot stand."). Moreover, it is a rule the City expressly asked the Eighth Circuit to apply if it found only one or two of LSGI's three breach of contract theories to be insufficient. Appellants' Brief, at 12 (stating that "if this Court were to find that only one theory was submitted in error, it must order a new trial"). Thus, there is no question that the Eighth Circuit was aware of the rule when it decided this case.

LSGI's suggestion that the court rejected the rule sub silentio and created a circuit split is simply ridiculous. The court did not reject the rule; it merely found – after considering each of the possible bases for the jury's finding of breach of contract and finding each basis to be insufficient as a matter of law – that the rule did not apply because the verdict rested on improper grounds. Pet. App. 22a. In such an instance, reversal without remand is entirely proper. See, e.g., Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 327 (1967) (When "[t]here are . . . dispositive issues of law which, if resolved in the defendant's favor, must necessarily terminate the litigation . . . there can be no reason whatsoever to prevent the court of appeals from ordering . . . the entry of judgment for the defendant."). The Eighth Circuit's opinion in this case, therefore, did not create a circuit split or conflict with

Supreme Court authority.[11] Consequently, there is no reason to grant certiorari.

[11] For the same reason, the Eighth Circuit's opinion did not create a "perverse rule" that general verdicts in favor of plaintiffs will be reversed without remand whenever "the defendant can demonstrate that any one of the several grounds presented to the jury by the plaintiff was factually insufficient." Pet. 16. The Eighth Circuit found all of the grounds presented to the jury insufficient as a matter of law. Pet. App. 22a.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Respectfully submitted,

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